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No. 86-6

In the Supreme Court of the United States

OCTOBER TERM, 1986

STATE OF ARIZONA, PETITIONER

v.

JOHN HARVEY ADAMSON

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether the Double Jeopardy Clause bars the prosecution of a defendant who voluntarily breaches the terms of a plea agreement that disposed of the original charges against him.

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INTEREST OF THE UNITED STATES

This case involves a claim that the Double Jeopardy Clause bars reprosecution when the defendant voluntarily breaches the terms of a plea agreement. Because plea agreements play an important role in the federal criminal justice system, and because the Court's decision here is likely to affect federal criminal prosecutions, the United States has a substantial interest in the outcome of this case.

STATEMENT

1. On June 2, 1976, Donald Bolles, a reporter for the Arizona Republic, was critically injured when a

powerful bomb exploded in his car. Bolles survived for 11 days, during which three of his limbs were amputated in an attempt to save his life. He died on June 13, 1976. *State* v. *Adamson* (*Adamson II*), 136 Ariz. 250, 253, 665 P.2d 972, 975, cert. denied, 464 U.S. 865 (1983).

The evidence that was produced at respondent's trial established that respondent placed the bomb in Bolles' car and lured Bolles to the spot where it was detonated. Respondent received $10,000 for his efforts. Bolles had been targeted, respondent told a companion, because he "was giving people a lot of hard times and stepping on people's toes." *Adamson II*, 136 Ariz. at 253-254, 665 P.2d at 975-976.

2. Respondent was indicted on the state criminal charge of "open murder" for his role in the Bolles killing. See Ariz. Rev. Ann. Stat. §§ 13-451 and 13-452 (repealed). Prior to jury selection, however, respondent and the State entered into a plea agreement (Pet. App. A36-A46, A69). The State agreed to amend the open murder charge to one of second degree murder; petitioner was to plead guilty to that charge and receive a sentence of between 48 and 49 years' imprisonment.[1] Respondent also received immunity from prosecution for certain other crimes. *Id.* at A36-A38, A40-A41. In return, respondent agreed "to testify fully and completely in any Court, State or Federal, when requested by proper authorities against any and all parties involved in the murder of Don Bolles" (*id.* at A38), and to "testify fully and completely at all times, whether under oath or not," at "all interviews, depositions, hearings and trials" (*id.* at A39). The agreement also provided

[1] Under that sentence, respondent actually would be incarcerated for 20 years and two months.

that, "[s]hould [respondent] refuse to testify or should he at any time testify untruthfully * * * then this entire agreement is null and void and the original charge will be automatically reinstated. [Respondent] will be subject to the charge of Open Murder, and if found guilty of First Degree Murder to the penalty of death or life imprisonment." *Id.* at A39-A40. Similarly, the State and respondent agreed that "[i]n the event this agreement becomes null and void, then the parties shall be returned to the positions they were in before this agreement" (*id.* at A44).

Before accepting the plea, the trial judge "in detail reviewed each paragraph of the plea agreement with [respondent]," receiving respondent's assurance that he understood the meaning of each provision (Pet. App. A71; see *id.* at A68). Among other things, the trial judge informed respondent that should he "refuse to testify * * * he would be subject to the charge of open murder"; respondent replied that "he understood what would happen if for any reason the agreement became null and void and the open murder charges were reinstated" (*id.* at A72). The trial judge ultimately made the finding that the plea was entered "voluntarily and intelligently with full understanding." *Adamson* v. *Superior Court* (*Adamson I*), 125 Ariz. 579, 583, 611 P.2d 932, 936 (1980). Respondent subsequently testified against Max Dunlap and James Robison on charges growing out of the Bolles murder. After Dunlap and Robison were convicted, respondent was sentenced in accordance with the terms of the plea agreement. Pet. App. A5.[2]

[2] At sentencing, the prosecutor stated that he "wish[ed] the record would show that it has been discussed with counsel,

3. In February 1980, the convictions of Dunlap and Robison were reversed by the Arizona Supreme Court and the cases were remanded for new trials. *State* v. *Dunlap*, 125 Ariz. 104, 608 P.2d 41 (1980); *State* v. *Robison*, 125 Ariz. 107, 608 P.2d 44 (1980). When the State sought to interview respondent to prepare for the retrials, however, respondent refused to cooperate. On April 3, 1980, he informed the State that he believed he had fulfilled his obligations under the plea agreement, although his attorney recognized that the State "may feel that [respondent] has not completed his obligations" and "may attempt to withdraw that plea agreement from him"; respondent also acknowledged through his attorney that "if the State were successful in doing so, [respondent] may be prosecuted for the killing of Donald Bolles on a first degree murder charge." Pet. App. A48-A50. Respondent nevertheless stated that he would testify in a retrial of Dunlap or Robison only "upon the offer of further consideration by the State of Arizona" (*id.* at A49), including, among other things, his release from custody (*id.* at A50-A53).

On April 9, 1980, the State attempted to interview respondent. When he refused to cooperate, the State indicated that, in its view, his action amounted to a violation of the plea agreement and that the State was free to prosecute him for first degree murder. Pet. App. A56-A57. The State accordingly scheduled respondent's deposition "in an effort to resolve this question" (*id.* at A57). Respondent refused to testify in the pretrial proceedings, however,

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and I believe counsel has discussed it with [respondent] that it may be necessary in the future to bring [respondent] back after sentencing for further testimony." Respondent's counsel agreed "[t]hat's our understanding" and "[t]hat's correct." Pet. App. A96-A97.

and the trial court refused to compel his testimony. The Arizona Supreme Court declined to accept jurisdiction of the State's Petition for a Special Action to challenge the trial court's ruling. See *Adamson I*, 125 Ariz. at 582, 611 P.2d at 935.

On May 8, 1980, the State accordingly filed a new information charging respondent with first degree murder. The trial court denied respondent's motion to dismiss the information on double jeopardy grounds. On respondent's Petition for a Special Action, the Arizona Supreme Court affirmed. The court first held, with "no hesitation," that the plea agreement "contemplates the availability of [respondent's] testimony whether at trial or retrial after reversal." *Adamson I*, 125 Ariz. at 583, 611 P.2d at 936. Having concluded that respondent violated the terms of the plea agreement, the court found it easy to dispose of respondent's double jeopardy argument, since the agreement "by its very terms waives the defense of double jeopardy if the agreement is violated" (125 Ariz. at 584, 611 P.2d at 937).[3]

Respondent then sought habeas corpus relief pursuant to 28 U.S.C. 2254, arguing that the state court had erred in its interpretation of the plea agreement (Pet. App. C7). The district court dismissed the petition. The court of appeals affirmed (*id.* at C1-C12; 667 F.2d 1030), finding that respondent received "a full and fair hearing of his claims in state court" and that the interpretation given the plea

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[3] As a matter of state law, the Arizona Supreme Court held that the State should not have proceeded with a new information; the court therefore vacated respondent's second degree murder conviction and guilty plea, reinstated the original charge, and dismissed the new information. *Adamson I*, 125 Ariz. at 583-584, 611 P.2d at 936-937.

agreement by the Arizona Supreme Court and by the district court "is eminently reasonable" (Pet. App. C10).[4] This Court then denied certiorari. 455 U.S. 992 (1982).

4. In October 1980, respondent was convicted of first degree murder and sentenced to death. The Arizona Supreme Court affirmed the conviction and sentence (see *Adamson II*, *supra*), and this Court again denied certiorari. 464 U.S. 865 (1983).

Respondent then filed another petition for habeas corpus, raising a number of issues relating to his trial and sentence. The district court again denied the petition, and a panel of the Ninth Circuit again affirmed. *Adamson* v. *Ricketts*, 758 F.2d 441 (1985). At the rehearing en banc stage, however, respondent argued for the first time in this habeas corpus proceeding that his trial on the first degree murder charge violated his double jeopardy rights (see Pet. App. A127 n.1). A majority of the en banc court accepted that argument and granted respondent relief (*id.* at A1-A36).

The court first held that jeopardy attached to the prosecution for second degree murder when the judgment of conviction was entered and respondent was sentenced on his plea (Pet. App. A14). The court also reasoned that second degree murder is a lesser included offense of first degree murder, so that a conviction on the former charge bars prosecution or conviction on the latter (*id.* at A15-A17). And the court

[4] The court of appeals noted that "[i]n his written refusal to testify and list of demands, [respondent] acknowledged that he ran the risk of reprosecution for first degree murder under the terms of the plea agreement. He cannot now claim immunity in what proved to be a losing gamble." Pet. App. C12.

found that respondent had not waived his double jeopardy rights by entering into the plea agreement, reasoning that such a waiver can be effective only if it involves "an intentional relinquishment or abandonment of a known right or privilege" (*id.* at A18 (citation omitted)). "It may well be argued," the court stated, "that the only manner in which [respondent] could have made an intentional relinquishment of a known double jeopardy right would be by waiver 'spread on the record' of the court after an adequate explanation" (*id.* at A20-A21). Even if respondent could have made an implied waiver of his double jeopardy right, the court continued, "the more reasonable interpretation of the agreement is that double jeopardy was not waived," since "[a]greeing that charges may be [reinstated] under certain circumstances is not equivalent to agreeing that if they are [reinstated] a double jeopardy defense is waived" (*id.* at A21-A22).

The court went on to hold that, even if the plea agreement could implicitly waive respondent's double jeopardy rights, that waiver would be effective in a given case only if "the defendant's action constituting the breach [of the agreement is] taken with the knowledge that in [committing the breach] he waives his double jeopardy rights" (Pet. App. A24). The court reasoned that a defendant acts with such knowledge only when he intentionally breaches his plea agreement. Here, the court concluded, respondent "reasonably believed that a refusal to testify did not constitute a breach of the agreement." In such circumstances, the court held, "there could be no knowing or intentional waiver until [respondent's] obligation to testify was announced by the court" (*id.* at A25). The court of appeals accordingly ordered re-

spondent freed "from the sentence and servitude of his conviction of first degree murder" (*id.* at A31).

Judge Brunetti, joined by three other judges, dissented (Pet. App. A58-A111). He noted that the court's analysis "render[ed] the plea agreement ineffectual and unenforceable from the inception" (*id.* at A80). He also criticized the court for basing its holding on the absence of an express waiver of a known right or privilege. In Judge Brunetti's view, a "defendant's role in bringing about * * * successive trials remove[s] any constitutional barrier to the second [trial]" (*id.* at A82). Here, Judge Brunetti concluded, respondent's refusal to testify was "the triggering event which * * * set into motion the second prosecution. [Respondent] must accept responsibility for the second prosecution; the double jeopardy clause 'does not relieve a defendant from the consequences of his voluntary choice.'" *Id.* at A84 (quoting *United States* v. *Scott*, 437 U.S. 82, 99 (1978)).[5]

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[5] Judge Kennedy both joined Judge Brunetti's dissent and dissented separately, emphasizing that "[j]eopardy is waived in a number of instances by the defendant's own actions, and no express waiver or admonition is required before the court finds the waiver to have taken place" (Pet. App. A119). He added: "The whole purpose of [plea] agreements, as in this case, is to permit the defendant to plead to lesser charges subject to the risk of facing more serious ones if he does not keep his end of the deal. For the court, deux ex machina, to drop the idea of double jeopardy into the plea bargain context is inconsistent with any reasonable interpretation of the contract made between the defendant and the state. The contract makes no sense if by some legal theory it is contended defendant did not accept it with full knowledge and understanding of its enforcement terms." *Id.* at A121-A122.

Judge Brunetti also saw "little doubt" that respondent breached the agreement when he refused to participate in interviews to prepare for the Dunlap and Robison retrials (Pet. App. A86), and he rejected the proposition that respondent "was merely advancing a reasonable interpretation of the plea agreement" (*id.* at A88). In all, Judge Brunetti found it "clear from the record that [respondent] knew the circumstances confronting him and the consequences of entering into the plea agreement. Accordingly, his acceptance of the agreement constituted a waiver of all conflicting rights existing at that time." *Id.* at A69.[6]

SUMMARY OF ARGUMENT

1. The court of appeals' holding is premised on the proposition that a defendant's action may trigger a new prosecution only if the defendant intentionally and knowingly relinquished his double jeopardy rights. That premise, however, is flatly inconsistent with this Court's decisions in the double jeopardy area, which repeatedly have held that the Double Jeopardy Clause does not bar successive trials when the defendant himself triggered the need for a second prosecution. Retrial is permissible, for example, when the defendant successfully challenges his conviction on appeal or in collateral proceedings, or when a mis-

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[6] Judge Brunetti also took issue with the remedy imposed by the court. The majority took the position that its holding left respondent's second degree murder conviction intact; the court of appeals left it to the Arizona Supreme Court to reinstate that conviction (see Pet. App. A31-A32). Judge Brunetti suggested, however, that the court's chosen remedy did not appear to be consistent with the terms of the plea agreement, since the agreement explicitly required the parties to be returned to their pre-plea positions in the event of a breach (*id.* at A109-A110). See also *id.* at A125-126 (Kennedy, J., dissenting).

trial is granted on the defendant's motion. Similarly, the Double Jeopardy Clause is not implicated when a defendant elects to have greater and lesser included offenses tried separately, although he normally is entitled to have the two resolved in one proceeding. This principle is fully applicable in the plea bargain context: the courts uniformly have concluded that when a defendant has his guilty plea vacated, a retrial on all the original charges is permissible.

In each of these examples, the crucial factor is that it was the defendant's voluntary action that brought about the second proceeding. In none of them, however, was the defendant's conduct accompanied by a knowing or intentional waiver of double jeopardy rights of the type required by the court of appeals. To the contrary, this Court has "implicitly rejected the contention that the permissibility of a retrial * * * depends on a knowing, voluntary and intelligent waiver of a constitutional right." *United States* v. *Dinitz*, 424 U.S. 600, 609-610 n.11 (1976). As the Court has noted, "traditional waiver concepts have little relevance [in this setting]"; rather, "[t]he important consideration, for purposes of the Double Jeopardy Clause, is that the defendant retain primary control over the course to be followed." *Id.* at 609 (footnote omitted). It is enough that the retrial is prompted by the defendant's actions, for "the Double Jeopardy Clause, which guards against Government oppression, does not relieve a defendant from the consequences of his voluntary choice." *United States* v. *Scott*, 437 U.S. 82, 99 (1978).

The court of appeals' holding cannot be reconciled with this principle. Respondent entered the plea agreement voluntarily, with full knowledge and understanding of the proviso that the agreement would

be rendered "null and void" and the original charge "automatically reinstated" if he failed to cooperate as he had agreed. In these circumstances, where it is undisputed that respondent's breach was the triggering event that set the new prosecution in motion, the court of appeals simply—and improperly—used the Double Jeopardy Clause to relieve respondent of the consequences of his voluntary choice. That conclusion would not be affected even if the court of appeals were correct in its highly implausible suggestion that respondent's reading of the plea agreement, although erroneous, was reasonable: respondent voluntarily chose to stand on a questionable reading of the plea agreement, with full knowledge that his interpretation could be rejected by the courts.

2. A review of the purposes of the Double Jeopardy Clause confirms that respondent's rights were not violated by his prosecution for first degree murder. Because respondent's breach of the agreement led the Arizona Supreme Court to vacate his conviction and sentence, he did not face the risk of multiple punishment for the same offense. Conversely, the State was not attempting to revive an unsuccessful prosecution: respondent had never faced trial or been exposed to conviction on the first degree murder charge. Once respondent's breach returned the parties to their original positions, the State simply sought to exercise "its right to one full and fair opportunity to convict [an individual] who ha[s] violated its laws." *Ohio* v. *Johnson*, 467 U.S. 493, 502 (1984).

The court of appeals' analysis is also contrary to the principle that a court must look to the implications "for the sound administration of justice" of applying a double jeopardy bar in a given context.

United States v. *Tateo*, 377 U.S. 463, 466 (1964). Far from taking those implications into account, the court of appeals' holding would render plea agreements almost entirely unenforceable by the government, at least to the extent that they imposed future obligations on the defendant. That holding would allow defendants to disregard the terms of their plea agreements at will, secure in the knowledge that their refusal to comply could not be reciprocated by the government. Such a result does nothing to safeguard the legitimate interests of defendants. To the contrary, far from furthering the purposes of the Double Jeopardy Clause, the decision below would permit defendants "to use the Double Jeopardy Clause as a sword" to prevent the State from securing compliance with the terms of its plea agreements. *Johnson*, 467 U.S. at 502.

ARGUMENT

PROSECUTION OF A DEFENDANT WHO BREACHES A PLEA AGREEMENT IS NOT BARRED BY THE DOUBLE JEOPARDY CLAUSE

The court of appeals offered three alternative rationales for its refusal to enforce the terms of respondent's plea bargain. First, it held that a defendant cannot relinquish his double jeopardy rights (and thus permit a new trial after jeopardy has once attached) unless he expressly waives those rights on the record (Pet. App. A18-A21). Second, it held that, even if an implied waiver of double jeopardy rights may be made, the plea agreement here effected no such waiver (*id.* at A22-A23). Third, it held that, even if the agreement did implicitly waive respondent's double jeopardy protections against a new prosecution, such a waiver would be effective only if respondent intentionally breached the plea agreement with the knowledge that in doing so he waived his

double jeopardy rights (*id.* at A23-A24). While these are alternative holdings, all are based on one common premise: that a defendant's action may trigger a new prosecution only if that action amounted to an "intentional relinquishment or abandonment of a known [double jeopardy] right," as that standard was described in *Johnson* v. *Zerbst*, 304 U.S. 458, 464 (1938). See Pet. App. A18-A19.

The court of appeals' premise is flatly inconsistent with this Court's decisions in the double jeopardy area, which repeatedly have held that the Double Jeopardy Clause does not protect a defendant from the consequences of his voluntary actions. At the same time, the court of appeals disregarded this Court's more general admonition that double jeopardy principles must be applied with an eye towards "the implications of [those] principle[s] for the sound administration of justice." *United States* v. *Tateo*, 377 U.S. 463, 466 (1964). And the court of appeals failed to take into account either the nature of the plea bargaining process or the plain meaning of respondent's bargain. When these considerations are weighed, it becomes clear that the court of appeals' holding is fatally flawed.

A. The Double Jeopardy Clause Does Not Relieve A Defendant Of the Consequences Of His Voluntary Actions

1. This Court has consistently held that the Double Jeopardy Clause does not bar successive trials when it is the defendant's action that triggers the need for a new prosecution—when, in other words, the defendant acts in a way that returns him to the situation that prevailed prior to the point at which jeopardy first attached. For example, it has long been the law that a defendant whose conviction is set aside

on appeal "may be tried anew upon the same indictment, or upon another indictment, for the same offence [*sic*] of which he had been convicted." *United States* v. *Ball*, 163 U.S. 662, 671-672 (1896).[7] A retrial also is permissible when the defendant has successfully sought collateral relief, see *Tateo*, 377 U.S. at 465, or when he has prevailed at trial on a motion to dismiss. See *Lee* v. *United States*, 432 U.S. 23, 33 (1977). And when the defendant "successfully seeks to avoid his trial prior to its conclusion by a motion for mistrial, the Double Jeopardy Clause is not offended by a second prosecution"—even where the mistrial motion is prompted by prosecutorial or judicial error. *United States* v. *Scott*, 437 U.S. 82, 93 (1978). See *United States* v. *Dinitz*, 424 U.S. 600, 608 (1976); *United States* v. *Jorn*, 400 U.S. 470, 485 (1971) (plurality opinion); see generally *Sanabria* v. *United States*, 437 U.S. 54, 63 n.15 (1978).

In other, related contexts, the Court similarly has held that multiple prosecutions growing out of the same offense may be permissible when the second proceeding was prompted or made necessary by the defendant's voluntary actions. Thus, "although a defendant is normally entitled to have charges on a greater and lesser offense resolved in one proceeding, there is no violation of the Double Jeopardy Clause when he elects to have the two offenses tried separately and persuades the trial court to honor his election." *Jeffers* v. *United States*, 432 U.S. 137, 152 (1977) (plurality opinion). And the Court has held that a defendant's guilty plea to a lesser included offense does not bar trial on the greater offense charged along with it, if it was the defendant's effort

[7] This rule does not apply, of course, when the conviction is set aside for insufficiency of the evidence. See *Burks* v. *United States*, 437 U.S. 1 (1978).

that led to "separate disposition of counts in the same indictment." *Ohio* v. *Johnson*, 467 U.S. 493, 502 (1984).

Not surprisingly, the courts of appeals have found this principle fully applicable in the context of plea bargains. Plea agreements commonly provide that a defendant will plead guilty to one or more counts of an indictment in exchange for the prosecution's agreement to dismiss the remaining counts. In that setting, if the defendant successfully moves to have his guilty plea vacated, the courts have uniformly held that he can properly be tried on all the original charges. Such a trial on all the charges is permissible because it was the defendant's "own decision to plead guilty and to have that plea set aside." *United States* v. *Barker*, 681 F.2d 589, 591 (9th Cir. 1982). See *Klobuchir* v. *Pennsylvania*, 639 F.2d 966, 969-970 (3d Cir.), cert. denied, 454 U.S. 1031 (1981); *Hawk* v. *Berkemer*, 610 F.2d 445, 447-448 (6th Cir. 1979); *United States* v. *Johnson*, 537 F.2d 1170, 1174 (4th Cir. 1976); *United States* v. *Anderson*, 514 F.2d 583, 586-587 (7th Cir. 1975); *United States* v. *Jerry*, 487 F.2d 600, 606 (3d Cir. 1973); *Ward* v. *Page*, 424 F.2d 491, 493 (10th Cir), cert. denied, 400 U.S. 917 (1970); *United States* v. *Myles*, 430 F. Supp. 98, 101-102 (D.D.C. 1977), aff'd, 569 F.2d 161 (D.C. Cir. 1978). Cf. *United States* v. *Whitley*, 759 F.2d 327, 332 (4th Cir.) (en banc), cert. denied, No. 84-6980 (Oct. 7, 1985); *Lowery* v. *Estelle*, 696 F.2d 333, 340-342 (5th Cir. 1983); *United States ex rel. Williams* v. *McMann*, 436 F.2d 103 (2d Cir. 1970), cert. denied, 402 U.S. 914 (1971).

2. In each of those settings, the crucial factor was the defendant's voluntary action that brought about the second proceeding. In none of them, however, was that action accompanied by a knowing, intelligent, or

intentional waiver of double jeopardy rights of the type required by the court of appeals here. The defendants who requested a mistrial or pursued an appeal, for example, were not warned by the court that in doing so they risked a retrial; at the same time, of course, the defendants did not explicitly relinquish (or, indeed, advert in any way to) their double jeopardy rights.

As this Court has stated, the permissibility of a retrial following a mistrial or a reversal of a conviction on appeal thus does not depend on the defendant's making a "knowing, voluntary and intelligent waiver of a constitutional right." *Dinitz*, 424 U.S. at 609-610 n.11. To the contrary, the Court has explained, "traditional waiver concepts have little relevance" in this setting; "[t]he important consideration, for purposes of the Double Jeopardy Clause, is that the defendant retain primary control over the course to be followed." *Id.* at 609 (footnote omitted). See *Scott*, 437 U.S. at 93-94; *Lee*, 432 U.S. at 32-33; *Jorn*, 400 U.S. at 484-485 n.11 (plurality opinion).[8]

[8] In *Green* v. *United States*, 355 U.S. 184, 189 (1957), the Court discussed the "waiver" of double jeopardy protections in terms of the voluntary relinquishment of a known right. The Court actually held, however, that the defendant's action did not amount to a "waiver" because it was not voluntary. The defendant in *Green* was tried on charges of first and second degree murder; the jury found him guilty only of second degree murder. When the verdict was set aside on the defendant's appeal, the government attempted to retry him for first degree murder as well. The Court held that the defendant's appeal did not constitute a "waiver" of his double jeopardy protections against such a reprosecution, reasoning that "[w]hen a man has been convicted of second degree murder and given a long term of imprisonment it is wholly fictional to say that he 'chooses' to forego his constitutional

It is enough that the retrial is prompted "by the actions of the defendant himself" (*Garrett* v. *United States*, No. 83-1842 (June 3, 1985), slip op. 3 (O'Connor, J., concurring)), for "the Double Jeopardy Clause, which guards against Government oppression, does not relieve a defendant from the consequences of his voluntary choice." *Scott*, 437 U.S. at 99.

The permissibility of retrial therefore does not turn on the existence of a conventional "waiver" of double jeopardy rights. As long as it is the defendant's voluntary action that aborts his trial or obviates his conviction, the principles underlying the Double Jeopardy Clause are satisfied: in that setting, requiring the defendant to stand trial again "is not an act of governmental oppression of the sort against which the Double Jeopardy Clause was intended to protect." *Scott*, 437 U.S. at 91. See *Justices of Boston Municipal Court* v. *Lydon*, 466 U.S. 294, 308 (1984); *Tibbs* v. *Florida*, 457 U.S. 31, 40 (1982). This principle thus involves not so much a relinquishment of

defense of former jeopardy on a charge of murder in the first degree in order to secure a reversal of an erroneous conviction of the lesser offense. In short, he has no meaningful choice." *Id.* at 191-192; see *id.* at 193-194.

Similarly, in *Menna* v. *New York*, 423 U.S. 61 (1975) (per curiam), the Court held that a defendant who had pleaded guilty after unsuccessfully seeking dismissal of his indictment on double jeopardy grounds did not "waive" his double jeopardy claim by the entry of his plea. See *id.* at 62-63 & n.2. The ruling in that case has no bearing here, since the defendant in *Menna* took no action to return himself to the position that he occupied prior to the attachment of jeopardy. In any event, the Court did not suggest that conduct having the effect of waiving a double jeopardy claim must satisfy the requirements of *Johnson* v. *Zerbst*, *supra*, in order to be valid.

constitutional prerogatives as a determination that the Clause simply does not apply when retrials are triggered by the defendants' actions.

3. The court of appeals' holding in this case cannot be reconciled with these principles of double jeopardy law. It is conceded that respondent entered the plea agreement voluntarily, with full knowledge of its provisions—including the proviso that the agreement would be rendered "null and void" and the original charge "automatically reinstated" if he failed to cooperate as agreed (Pet. App. A39-A40). And respondent plainly understood the consequences of a breach; indeed, in the letter announcing his refusal to cooperate, he declared his awareness that the State might seek to nullify the plea agreement and, if successful, might prosecute him for first degree murder (*id.* at A49-A50). Given the plain terms of the plea agreement, it would have been wholly incredible for him to have suggested otherwise.[9] Cf. *Taylor* v. *United States*, 414 U.S. 17, 19-20 (1973). In these circumstances, where it is undisputed that respondent's breach was "the triggering event * * * which set in motion the new prosecution" (Pet. App. A84 (Brunetti, J., dissenting)), the court of appeals simply—and improperly—used the Double Jeopardy

[9] Indeed, as Judge Kennedy noted in dissent (Pet. App. A121-A122), the essential purpose of any plea agreement is to permit the defendant to avoid prosecution on a greater charge, subject to the threat of prosecution on that charge if he fails to comply with the agreement's terms. That threat is the essential enforcement mechanism of all plea agreements. It belies belief that either the State or the defendant would enter into a plea agreement without appreciating this—or that, as the court of appeals held to be the case here (*id.* at A21-A22), either side would believe that the defendant could assert double jeopardy as a defense to such a prosecution.

Clause to rescue respondent "from the consequences of his voluntary choice." *Scott*, 437 U.S. at 99.

As long as respondent knew he would be subject to reprosecution if he violated the plea agreement, it was of no consequence whether he knew that the legal significance of what he was doing was to waive his double jeopardy rights. The information on the face of the agreement—which clearly advised respondent that he would be subject to prosecution under the original charge if he failed to comply with his obligation of cooperation—was all the information he needed to make his choice. By consciously running the risk that he would have to face prosecution on the original charge, respondent knowingly abandoned the protection that the plea agreement afforded him. An awareness of the legal description of that protection would not have altered in any way the nature of the choice he faced.

That the reprosecution ultimately is attributable to respondent also comes clear from the nature of the plea bargaining process itself. Plea bargains are essentially contractual undertakings that are rendered unenforceable when either side commits a breach. See generally *Mabry* v. *Johnson*, 467 U.S. 504, 509-510 (1984); *United States* v. *Baldacchino*, 762 F.2d 170, 179 (1st Cir. 1985); *United States* v. *Carrillo*, 709 F.2d 35, 36-37 (9th Cir. 1983); *United States* v. *Arnett*, 628 F.2d 1162, 1164 (9th Cir. 1979); *United States* v. *Gogarty*, 533 F.2d 93, 95 (2d Cir. 1976). Here, the State agreed to forgo a first degree murder prosecution on the express condition that respondent fulfill the terms of the agreement. When respondent refused to comply, his position did not differ in any essential way from that of a defendant who seeks to withdraw a guilty plea: in

essence, respondent simply wanted to get out of his bargain. In doing so, he returned the parties to the positions that they occupied before jeopardy attached. The Double Jeopardy Clause, after all, "represents a constitutional policy of finality for the defendant's benefit" (*Jorn*, 400 U.S. at 479 (plurality opinion)); a defendant who pretermits prosecution by entering into an executory agreement and then refuses to comply should not benefit from that policy.

This conclusion would not be affected even if the court of appeals were correct in its implausible suggestion that respondent's reading of the plea agreement, although erroneous, was reasonable.[10] Respondent was entitled to a judicial determination as to

[10] In finding respondent's position reasonable, the court of appeals pointed to a provision of the plea agreement stating that respondent would be sentenced " 'at the conclusion of his testimony' "; the court of appeals concluded that this provision might be read to terminate respondent's obligations to testify at the time that he was sentenced. Pet. App. A25-A26. The Arizona Supreme Court, however, found it plain from the terms of the agreement that respondent was obligated to testify "at trial or retrial after reversal," and explained that at the sentencing hearing itself respondent evidenced "a clear understanding that [he] would testify after [his] sentencing." *Adamson I*, 125 Ariz. at 583, 611 P.2d at 936. Given this definitive factual finding that respondent "clearly understood" his obligations, it is difficult to see how his refusal to cooperate could have been made in good faith, no matter how ambiguous the terms of the plea agreement. In any event, on respondent's first petition for habeas corpus, a panel of the Ninth Circuit found the Arizona Supreme Court's interpretation of the agreement "eminently reasonable" (Pet. App. C10). And Judge Brunetti's careful analysis of the record makes it clear that respondent's refusal to testify was entirely unjustified.

whether he had breached the agreement. See *United States* v. *Verusio*, No. 85-1690 (7th Cir. Oct. 9, 1986); *United States* v. *Calabrese*, 645 F.2d 1379, 1389-1390 (10th Cir.), cert. denied, 451 U.S. 1018 (1981); *United States* v. *Simmons*, 537 F.2d 1260, 1261-1262 (4th Cir. 1976). He received that determination from the Arizona Supreme Court before the prosecution was begun on the original charges. To be sure, that determination came after the prosecutors had already concluded that respondent was in breach of the agreement and had decided to reinstate the original charges against him as a result. But the Double Jeopardy Clause does not relieve defendants of the burden of making difficult decisions; a defendant who must decide whether to seek a mistrial, for example, often "face[s] a 'Hobson's choice' " (*Dinitz*, 424 U.S. at 609) between surrendering the right to have his case decided in one proceeding and allowing a trial tainted by error to continue. Similarly, a defendant who asserts (as respondent did) a reading of his plea agreement that is no better than arguable "takes the risk" that a court will find his interpretation incorrect. *Scott*, 437 U.S. at 100 n.13.[11] That this procedure puts the defendant to a difficult

[11] It may be added that, as a practical matter, a defendant who advances a good faith interpretation of his plea agreement is unlikely to suffer even if that interpretation ultimately is rejected by a court. Once the defendant's obligations are settled, the prosecution is likely to be satisfied if the defendant is willing to comply with the terms of the agreement (as long as the value of the defendant's cooperation has not diminished during the period of his recalcitrance); after all, the government's need for the defendant's cooperation—which induced it to enter into the agreement as an initial matter—is likely to lead it to the same conclusion the second time around.

choice between acquiescing in the government's request and asserting a debatable interpretation of the plea agreement does not implicate the Double Jeopardy Clause, as long as the choice remains the defendant's to make. See *Dinitz*, 424 U.S. at 609.

B. The Court Of Appeals' Holding Is Inconsistent With The Policies Of The Double Jeopardy Clause

1. As the discussion above suggests, the purposes of the Double Jeopardy Clause—forestalling a certain sort of "governmental oppression" (*Scott*, 437 U.S. at 91)—are not implicated when the defendant's voluntary action invites the reprosecution. A more detailed look at those purposes confirms that "[n]o interest of respondent protected by the Double Jeopardy Clause" (*Johnson*, 467 U.S. at 501) is affected by his prosecution on a first degree murder charge.

"The primary purpose of foreclosing a second prosecution after conviction * * * is to prevent a defendant from being subjected to multiple punishment for the same offense." *Lydon*, 466 U.S. at 307. See *Brown* v. *Ohio*, 432 U.S. 161, 166 (1977). That concern has no bearing in this case, where respondent's breach of the plea agreement led the Arizona Supreme Court to vacate his conviction and sentence. Conversely, the State is not attempting to revive an unsuccessful prosecution: respondent has never been exposed to conviction on the first degree murder charge, "nor has the State had an opportunity to marshal its evidence and resources more than once or to hone the presentation of its case through a trial." *Johnson*, 467 U.S. at 501. See *Tibbs*, 457 U.S. at 41-42.[12] And a case in which the defendant

[12] Similarly, there has been no implied acquittal of respondent for first degree murder. See *Johnson*, 467 U.S. at 501. Compare *Green* v. *United States*, 355 U.S. 184, 191 (1957).

pleaded guilty prior to jury selection plainly does not involve "the defendant's 'valued right to have his trial completed by a particular tribunal.'" *Dinitz*, 424 U.S. at 606 (citation omitted).

Equally as important, the imposition of a double jeopardy bar is not necessary to serve what the Court has often stated as the broad purpose of the Clause: "ensur[ing] that the State does not make repeated attempts to convict an individual, thereby exposing him to continued embarrassment, anxiety, and expense, while increasing the risk of an erroneous conviction." *Johnson*, 467 U.S. at 498-499. See *Scott*, 437 U.S. at 87; *Green* v. *United States*, 355 U.S. 184, 187-188 (1957). At the time the State initially was prepared to go to trial in this case, respondent induced it to terminate the prosecution on the conditions set out in the plea agreement. Now that respondent's breach of the agreement has returned the parties to their original positions, the State is simply seeking to exercise "its right to one full and fair opportunity to convict [an individual] who ha[s] violated its laws." *Johnson*, 467 U.S. at 502. See *Arizona* v. *Washington*, 434 U.S. 497, 509 (1978).

2. The flaw in respondent's position also is suggested by the other prong in this Court's double jeopardy analysis, which has looked to the implications "for the sound administration of justice" of applying a double jeopardy bar in a given context. *Tateo*, 377 U.S. at 466. See *Lydon*, 466 U.S. at 308. Far from taking such considerations into account, the court of appeals' holding renders plea agreements—which are, of course, an "important component of this country's criminal justice system" (*Blackledge* v. *Allison*, 431 U.S. 63, 71 (1977))—almost entirely unenforceable by the government, at least to the ex-

tent that they impose future obligations on the defendant.

Predictability and reliance are "the foundation of plea bargaining." *United States* v. *McIntosh*, 612 F.2d 835, 837 (4th Cir. 1979). The approach taken by the court of appeals, however, would make reliance on the defendant's undertakings impossible by "giv[ing] the defendant more than the 'benefit of his bargain.'" *United States* v. *Anderson*, 514 F.2d 583, 587 (7th Cir. 1975). Indeed, unless the plea agreement is drafted with extraordinary precision—a precision that, if the scrutiny given the agreement here by the court of appeals is any indication, is beyond the capability of most attorneys (see Pet. App. A20-A22, A25-A26)—the court of appeals' holding would allow defendants to disregard the terms of their plea agreements at will, secure in the knowledge that their refusal to comply could not be reciprocated by the government. The result inevitably would be to discourage the use of plea agreements, a development that would benefit neither society nor criminal defendants. See generally *McMann*, 436 F.2d at 107.

This would be "a high price indeed for society to pay" (*Tateo*, 377 U.S. at 466) even if the court of appeals' approach otherwise had beneficial effects. The court's holding, however, does nothing to safeguard the legitimate interests of defendants. Their expectations are protected by the plea agreement itself—whose terms are enforceable as a matter of due process (see generally *Mabry*, 467 U.S. at 509; *Santobello* v. *New York*, 404 U.S. 257, 262-263 (1971))—and by the Double Jeopardy Clause, which stands as an independent bar to renewed prosecution on a greater offense when the defendant has pleaded guilty to a lesser included offense. See *Brown* v.

Ohio, *supra*. The court of appeals' decision in this case thus gives defendants no added protection against government overreaching. Instead, the decision simply permitted respondent "to use the Double Jeopardy Clause as a sword" to prevent the State from securing compliance with its plea agreement. *Johnson*, 467 U.S. at 502. Giving such a benefit to a defendant who breaches his plea agreement would be perverse. Respondent's maneuvers should not be rewarded under the mantle of protecting his right to be free from double jeopardy; to the contrary, those maneuvers "should result in a *surrender*" of his claim to the protection of the Double Jeopardy Clause. *Sanabria*, 437 U.S. at 80-81 (Blackmun, J., dissenting) (emphasis added).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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